Office-Supreme Court, U.S.
FILED
FEB 20 1963
JOHN F. DAVIS, CLERK

No. 768

In the Supreme Court of the United States

OCTOBER TERM, 1962

LESTER C. NEWTON TRUCKING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal from the United States District Court for the District of Delaware

MOTION TO AFFIRM

R. EDWIN BRADY
1424 Sixteenth Street, N. W.
Washington 6, D. C.

HARRY J. BREITHAUPT, JR.
Transportation Building
Washington 6, D. C.

T. RANDOLPH BUCK
3600 West Broad Street
Richmond 30, Virginia

CARL HELMETAG, JR.
Six Penn Center Plaza
Philadelphia 4, Pennsylvania

JAMES G. LANE
226 South Station
Boston 10, Massachusetts

J. EDGAR MCDONALD
466 Lexington Avenue
New York 17, New York

JAMES W. NISBET
517 West Adams Street
Chicago 6, Illinois

ED WHITE
517 West Adams Street
Chicago 6, Illinois

Counsel for Appellees

February 1963

TABLE OF CONTENTS

	Page
STATEMENT	2
ARGUMENT	4
CONCLUSION	10
PROOF OF SERVICE	11

CITATIONS

Cases:

East Texas Motor Freight Lines, Inc. v. Frozen Food Express, 351 U.S. 49 (1956) 9

Frozen Food Express v. United States, 128 F. Supp. 374 (S.D. Tex. 1955) *rev'd in part* 351 U.S. 40 (1956) *aff'd in part sub nom. East Texas Motor Freight Lines, Inc. v. Frozen Food Express*, 351 U.S. 49 (1956), *further consideration* 148 F. Supp. 300 (S.D. Tex. 1956) *aff'd sub nom. Interstate Commerce Commission v. Frozen Food Express*, 355 U.S. 6 (1957) 9

Home Transfer & Storage Co. v. United States, 141 F. Supp. 500 (W.D. Wash. 1956) *aff'd sub nom. Interstate Commerce Commission v. Home Transfer & Storage Co., Inc.*, 352 U.S. 884 (1956) 6, 7, 8, 9

Hughes Extension—Frozen Foods, 71 M.C.C. 457 (1957) 6

Midwest Coast Transport, Inc., Extension—Montana, 74 M.C.C. 1 (1957) 6

Midwest Emery Freight System, Inc. v. United States, 202 F. Supp. 229 (N.D. Ill. 1961) 4, 6, 9

Milk Transport, Inc. v. Interstate Commerce Commission, 190 F. Supp. 350 (D. Minn. 1960), *aff'd sub nom. Milk Transport, Inc. v. United States*, 368 U.S. 5 (1961) 4, 6, 9

Statutes:

	Page
28 U.S.C. 2284	2
Transportation Act of 1958, Public Law 85-625, 72 Stat. 573	2, 3, 4, 5, 7, 9
Interstate Commerce Act, 49 U.S.C. 1, *et seq.*	2, 4, 9

Miscellaneous:

Administrative Ruling 107, Bureau of Motor Carriers, Interstate Commerce Commission	5, 6, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 768

LESTER C. NEWTON TRUCKING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal from the United States District Court for the District of Delaware

MOTION TO AFFIRM

Appellees,[1] pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court of the United States,

[1]The appellees filing this Motion to Affirm are: Regular Common Carrier Conference of the American Trucking Associations, Inc.; Association of American Railroads; Class I Railroads in Southern Territory; Bangor & Aroostook Railroad Company, Maine Central Railroad Company, Boston & Maine Railroad, and New York, New Haven & Hartford Railroad Company; Class I Rail Carriers in Western District; New York Central Railroad Company, Baltimore & Ohio Railroad Company, Pennsylvania Railroad Company, Lehigh Valley Railroad Company, Chesapeake and Ohio Railway Company, and Erie-Lackawanna Railroad Company. These appellees were parties to the proceeding before the Interstate Commerce Commission and were intervening defendants in the case before the district court.

move that the judgment of the district court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on October 15, 1962, by a district court of three judges specially constituted pursuant to 28 U.S.C. § 2284, dismissing appellants' complaint which sought to set aside orders of the Interstate Commerce Commission.[2]

On February 5, 1959, the National Association of Frozen Food Packers and other parties filed a petition with the Interstate Commerce Commission for the issuance of a declaratory order that the transportation of "frozen cooked vegetables, such as french fried potatoes" were exempt from regulation by the Commission prior to the Transportation Act of 1958.[3] The petitioners were attempting to establish by such a declaratory order (1) that frozen cooked vegetables were exempt from regulation by the Commission prior to the Transportation Act of 1958, (2) that frozen cooked vegetables were made subject to regulation by Section 7(a) of that act,[4] and (3) that motor carriers who transported frozen cooked vegetables on and after May 1, 1958, [apparently on the belief that such commodities were exempt from regulation] were entitled to "grandfather" rights under Section 7(c) of that act without proving public convenience and necessity.

---

[2] The final judgment is not printed in appellants' Jurisdictional Statement. The opinion of the district court is attached to appellants' Jurisdictional Statement as Appendix A.

[3] Transportation Act of 1958, Public Law 85-625, 72 Stat. 573.

[4] Section 7 of the Transportation Act of 1958 amended Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. 303(b)(6).

Following hearings, Division 1 of the Commission on September 28, 1959, issued a unanimous report and order, in which it made the necessary findings and concluded that the considered frozen cooked vegetables were subject to regulation prior to the Transportation Act of 1958 (J.S. 41). A petition for reconsideration of this order was filed by the appellants, but it was denied by the entire Commission on August 3, 1961.

Appellants brought this action in the United States District Court for the District of Delaware for the purpose of having the report and order of September 28, 1959, and the order of August 3, 1961, set aside, and for the further purpose of having the district court enter a decree declaring that frozen cooked vegetables were exempt from regulation prior to the Transportation Act of 1958 and that the transportation by motor vehicle of such vegetables was made subject to regulation by that act. In a unanimous decision the district court dismissed the complaint on the grounds that the Commission's report and orders were in accord with the statutes and were not unreasonable (J.S. 28 and 30). The district court further concluded that frozen cooked

The report of the Commission is attached to the appellants' Jurisdictional Statement as Appendix B. The order of the Commissioners is not printed in appellants' Jurisdictional Statement but it is a part of the record which was transmitted to this Court.

"The following vegetables were specifically mentioned by name in the Commission's findings and conclusions because they are the only ones on which the appellants introduced evidence at the hearing: frozen french fried potatoes, frozen rissole potatoes, frozen potato puffs, frozen canned sweet potatoes, frozen whipped potatoes, frozen french fried onion rings, frozen precooked ponch-packed vegetables, in general, and frozen precooked ponch-packed vegetables with sauce, in particular (J.S. 30 and 41).

This order of the Commission is not printed in appellants' Jurisdictional Statement but it is a part of the record which was transmitted to this Court.

vegetables were not made subject to regulation by the Transportation Act of 1958 and, therefore, the transportation of such commodities is not within the purview of the "grandfather" rights conferred by Section 7(c) of that act (J.S. 27-28).

ARGUMENT

The decision of the district court is plainly correct and is in accord with the decisions of other district courts on virtually the same question, including one, the *Milk Transport* case, which was recently affirmed by this court: *Midwest Emery Freight System, Inc. v. United States*, 202 F. Supp. 229 (N.D. Ill. 1961); *Milk Transport, Inc. v. Interstate Commerce Commission*, 190 F. Supp. 350 (D. Minn. 1960), *aff'd sub nom. Milk Transport, Inc. v. United States*, 368 U.S. 5 (1961).

The ultimate question presented in this case is whether motor carriers which transported frozen cooked vegetables on and after May 1, 1958, are entitled to "grandfather" rights under Section 7(c) of the Transportation Act of 1958. Since Section 7 of that act created the "grandfather" rights, the answer to this question must be found in the meaning of that section.

Section 7(c) of the Transportation Act of 1958 (commonly referred to as the "grandfather clause") provides that the Interstate Commerce Commission shall "without proof of public convenience and necessity issue a certificate of permit to motor carriers which were transporting on and after May 1, 1958, property made subject to the provisions of part II of that Act [Interstate Commerce Act] by paragraph (a) of this section" (J.S. 4).

With respect to what property was made subject to regul-

lation by paragraph (a) of Section 7, that paragraph provides in pertinent part as follows:

> "(a) . . . *Provided*, That the words . . . 'agricultural . . . commodities (not including manufactured products thereof)' as used herein shall include property shown as 'Exempt' in the Commodity List incorporated in the ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not exempt': *Provided further, however*, That notwithstanding the preceding proviso the words . . . 'agricultural . . . commodities (not including manufactured products thereof)' shall not be deemed to include . . . 'frozen vegetables . . .'" (J.S. 45-46)

It is apparent from the above that Congress adopted the exempt and not exempt status of commodities as listed in Ruling 107, except as to the eleven commodities, one of which was frozen vegetables, named in the second proviso of paragraph (a) of that section. As to those eleven commodities, Congress refused to adopt their previous classification as exempt and, instead, specifically declared that henceforth their transportation would be subject to regulation. The only commodities, therefore, which were "made subject to regulation" by paragraph (a) are the ones listed as exempt in Ruling 107 which then had their status changed to not exempt by being included in the eleven commodities specifically named in the second proviso of that paragraph. For example, cocoa beans and tea were listed in Ruling 107 as exempt, but they were made subject to regulation by being included among the eleven commodities specifically named in the second proviso of paragraph (a). Citrus juices and crude rubber were listed in Ruling 107 as not exempt and the courts below held that they were not made subject to

regulation by that paragraph. *Midwest Emery Freight System, Inc. v. United States*,[8] *Milk Transport, Inc. v. Interstate Commerce Commission*.[9]

The portions of Ruling 107 applicable to this case are:[10]

> "Vegetables
>
> Candied sweet potatoes, frozen—Not exempt—Case 7,[11] Note 6.
>
> Cooked—Not exempt—Bureau opinion.
>
> French fried potatoes—Not exempt—Case 10.[12]
> Frozen, fresh—Exempt—Case 21.[13]"

As may be seen by the above, two of the cooked vegetables involved in this case, french fried potatoes and frozen candied sweet potatoes, were specifically listed as not exempt in Ruling 107 and clearly come within the holding of the *Milk Transport* case that commodities so listed were not made subject to regulation by paragraph (a).

With respect to the other cooked vegetables involved in this case, the district court followed the ruling of the *Milk*

---

[8] 202 F. Supp. 229 (N.D. Ill. 1961).

[9] 190 F. Supp. 350 (D. Minn. 1960), *aff'd sub nom. Milk Transport, Inc. v. United States*, 368 U.S. 5 (1961).

[10] The section of Ruling 107 which pertains to "Vegetables" is set out in full on pages 2 and 3 of the "Petition of the National Association of Frozen Food Packers, et al. for a Declatory Order," dated February 5, 1959. That petition was a part of the record which was transmitted to this Court.

[11] *Hughes Extension—Frozen Foods*, 71 M.C.C. 457 (1957).

[12] *Midwest Coast Transport, Inc. Extension—Montana*, 71 M.C.C. 1 (1957).

[13] *Home Trucking & Storage Co. v. United States*, 141 F. Supp. 500 (W.D. Wash. 1956), *aff'd sub nom. Interstate Commerce Commission v. Home Trucking & Storage Co., Inc.*, 352 U.S. 881 (1956).

Transport case and held that since cooked vegetables were listed as not exempt in Ruling 107, they were not made subject to regulation by paragraph (a) (1) (S. 27).

Since it was necessary to establish a line of demarcation between frozen fresh vegetables and cooked vegetables, the Commission in its report of September 28, 1959, concluded that "any frozen vegetables which have been cooked in water or steam for a period longer than that necessary for the inactivation of the enzymes" are cooked vegetables (J.S. 41). On this point the district court presented an exceptionally lucid analysis of the basis for, and necessity of, the Commission's use of the "inactivation of the enzymes" criterion:

> "Ruling 107 of the Inter-state Commerce Commission, specifically adopted by Congress, provides that cooked vegetables are not exempt and were not exempt prior to the Amendment of 1958. Ruling 107 also provides that 'vegetables, frozen, fresh' were exempt under the Home Transfer & Storage case.
>
> "These provisions are of equal weight and validity and both must receive full recognition by this Court. It is clear that some construction must be adopted to harmonize and give effect to both provisions. The authoritative ruling that held that frozen vegetables were exempt was the Home Transfer case. That case, however, held that the vegetables there concerned [illegible] handling to the point of inactivation of the enzyme, and then frozen, remained essentially in the same state and [illegible] unprocessed vegetables. In effect the Commission, setting blanching merely to the point of destroying the enzymes and then freezing, did not change their characteristics as fresh vegetables. Thus the [illegible] of demarcation and [illegible] the statute [illegible] the district court [illegible]

destroys the exemption provided by Congress is contrary to the express language of the Home Transfer case, as affirmed by the Supreme Court. A determination that unrestricted cooking followed by freezing creates an exemption is directly contrary to the conclusion reached by the Interstate Commerce Commission as indicated in the Ruling 107 and expressly adopted by Congress, which said that 'cooked vegetables' were not exempt.

. . . The Commission has adopted the view of the Supreme Court that cooking vegetables to the point of inactivation of the enzymes and then freezing them leaves such vegetables as frozen fresh vegetables and exempt from regulation. The Commission has concluded that cooking vegetables beyond the point indicated and then freezing them makes them fall within the classification of 'cooked vegetables' which Congress has said are not exempt.

"We cannot say that the construction put upon the Statute by the Commission is unreasonable. Indeed, it would be difficult to phrase a different result without 'doing violence to the indicated intention of Congress.'" (J.S. 27-28)

Appellants also contend that if this Court affirms the district court's judgment, it would cause the motor carrier appellants' service to be atomized or fragmentized. (J.S. 10-12). The district court correctly answered this contention when it tersely stated that "such a result is caused by the Act of Congress itself and the remedy must there be sought." (J.S. 28). The Interstate Commerce Commission is the public body charged with the maintenance of efficient and economical transportation in the United States, and if, as appellants complain, service to the public would be disrupted, then any operating rights required to give the public adequate service may be obtained by filing an application

for such rights with that Commission in accordance with the usual statutory procedure.[14]

The meanings of Section 203(b)(6) (the agricultural exemption clause) of the Interstate Commerce Act and Section 7 (the "grandfather" clause) of the Transportation Act of 1958 have been litigated on numerous occasions.[15] The unanimous report and orders of the Commission and the unanimous decision of the district court sustaining those orders are well reasoned and are in accordance with all prior court decisions on these subjects. In fact, the specific question presented in this case, the interpretation of Section 7 of the Transportation Act of 1958, was recently before this Court in the *Milk Transport* case. Appellees respectfully submit that the question presented in the instant case comes within the holding of the *Milk Transport* case and that fur-

[14] In this regard the appellants stated in footnote 17 of the Jurisdictional Statement that approximately 500 motor carriers are transporting frozen vegetables pursuant to the "grandfather" rights created by Section 7(c) of the Transportation Act of 1958. It should be noted that only twelve motor carriers appear as appellants in this case. The substantial majority of the approximately 500 motor carriers transporting frozen fresh vegetables pursuant to "grandfather" rights are represented by one of the appellees, the Regular Common Carrier Conference of the American Trucking Associations, Inc., which supports the decisions of the Commission and the district court.

[15] *Midwest Emery Freight System, Inc. v. United States*, 202 F. Supp. 220 (N.D. Ill. 1961); *Milk Transport, Inc. v. Interstate Commerce Commission*, 190 F. Supp. 350 (D. Minn. 1960), *aff'd sub nom. Milk Transport, Inc. v. United States*, 368 U.S. 5 (1961); *Hunter & Storage Co. v. United States*, 141 F. Supp. 500 (W.D. Wash. 1956), *aff'd sub nom. Interstate Commerce Commission v. Hunter Transfer & Storage Co., Inc.*, 352 U.S. 884 (1956); *Jackson Fruit Express v. United States*, 128 F. Supp. 37 (D. Nev. 1955), *aff'd per curiam*, 351 U.S. 40 (1956), *aff'd in part sub nom. Interstate Motor Freight Lines, Inc. v. Denver Food Terminal*, 351 U.S. 44 (1956), *further consideration*, 148 F. Supp. 880 (D. Nev. 1956), *aff'd sub nom. Interstate Commerce Commission v. Jackson Fruit Express*, 355 U.S. 6 (1957).

ther review of this subject is unnecessary and would serve no useful purpose.

CONCLUSION

The appeal presents no substantial question warranting further review, and the judgment of the district court should be affirmed.

Respectfully submitted.

R. EDWIN BRADY
1424 Sixteenth Street, N. W.
Washington 6, D. C.

HARRY J. BREITHAUPT, JR.
Transportation Building
Washington 6, D. C.

T. RANDOLPH BUCK
3000 West Broad Street
Richmond 30, Virginia

CARL HELMETAG, JR.
Six Penn Center Plaza
Philadelphia 4, Pennsylvania

JAMES G. LANE
220 South Station
Boston 10, Massachusetts

J. EDGAR McDONALD
400 Lexington Avenue
New York 17, New York

JAMES W. NISBET
547 West Adams Street
Chicago 6, Illinois

EDWARD [illegible]
547 West Adams Street
Chicago 6, Illinois

Counsel for Appellees.

February 1963

PROOF OF SERVICE

I, T. Randolph Buck, Attorney for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of February, 1963, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof, in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellee, United States of America, copies to The Honorable Robert F. Kennedy, The Attorney General of the United States, Department of Justice, Washington 25, D. C., The Honorable Archibald Cox, Solicitor General, Department of Justice, Washington 25, D. C., and The Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.

2. On the Appellee, Interstate Commerce Commission, copies to The Honorable Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and The Honorable Fritz R. Kahn, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Appellants, Lester C. Newton Trucking Company, Watkins Motor Lines, Inc., Colonial Refrigerated Transportation, Inc., Cole Hedin Trucking Lines, Inc., Warren P. Kurtz, d/b/a Lake Refrigerated Service, Langdon Truck Lines, Inc., Peter Hollebrand, Eastman Gillerson & Company, Ralph E. Dunkley, d/b/a Dunkley Distributing Company, T. Edward Lamaire, Hale Distributing Co., Inc., Seabrook Farms Co., Division, H. Leeper & Company, Mrs. Paul's Kitchens, Division of T. J. McAfee & Co., Inc., Dulany Foods, Inc., Southland Frozen Foods, Inc., Ark-Homa Farms Frozen Foods, Inc., The Snake River Trout Company, Ashdown, Inc., Boral Seafoods, Inc.,

and The Winter Garden Freezer Co., Inc., copies to their attorneys, H. Charles Ephraim, Esq., 1001 Fifteenth Street, N. W., Washington 5, D. C., William J. Augello, Jr., Esq., 2 West Forty-fifth Street, New York 36, New York, and H. James Conaway, Jr., Esq., 1401 Bank of Delaware Building, Wilmington, Delaware.

T. Randolph Buck
3600 West Broad Street
Richmond 30, Virginia
Attorney for Appellees